

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

IN THE MATTER OF A PETITION FOR
 JUDICIAL ASSISTANCE PURSUANT TO
 28 U.S.C. § 1782 BY

MACQUARIE BANK LIMITED,

Petitioner.

Case No. 2:14-cv-0797-GMN-NJK

ORDER GRANTING *EX PARTE*
 PETITION

(Docket No. 1)

Pending before the Court is Petitioner Macquarie Bank Limited's *ex parte* petition for an order pursuant to 28 U.S.C. § 1782 to conduct discovery for use in proceedings in the Netherlands. *See* Docket No. 1. On May 23, 2014, the Court ordered Petitioner to provide supplemental materials. Docket No. 5. The Court has now received those supplemental filings from Petitioner in support of its request. *See* Docket Nos. 6-7. The Court finds the pending petition properly resolved without oral argument. *See* Local Rule 78-2. For the reasons discussed more fully below, the petition is hereby **GRANTED**.

I. BACKGROUND

There are three relevant actions pending in the District Court of Amsterdam, the Netherlands, as well as another contemplated action in the Netherlands. *See, e.g.,* Rumora-Scheltema Decl. ¶ 2 (Docket No. 1). Sherman Ching Ma ("Ma") is a corporate officer of some of the parties to those actions, and Petitioner asserts that he appears to direct and control their activities. *See, e.g., id.* at ¶¶ 5-6, 17. Mr. Ma himself is also a party to one of the pending actions. *See id.* at ¶ 14. Petitioner seeks to

1 subpoena Mr. Ma for the taking of his deposition and the production of documents. *See, e.g.,* Mills
2 Decl. Exhs. 1, 2 (Docket No. 1) (proposed subpoenas). Pending before the Court is Petitioner's request
3 for an order authorizing the issuance of those subpoenas pursuant to § 1782.

4 **II. EX PARTE FILING OF PETITION**

5 As an initial matter, the Court notes that Petitioner seeks relief from the Court on an *ex parte*
6 basis. *Ex parte* requests are disfavored and generally limited to emergency situations because such
7 requests disrupt the adversarial system on which the Court generally operates. *See, e.g., In re*
8 *Intermagnetics America, Inc.*, 101 B.R. 191, 192-193 (C.D. Cal. 1989). Nonetheless, § 1782 petitions
9 are frequently reviewed on an *ex parte* basis. *See In re Republic of Ecuador*, 2010 WL 3702427, *2
10 (N.D. Cal. Sept. 15, 2010). The resulting order provides only that discovery is authorized, *see In re*
11 *Letter of Request from Supreme Court of Hong Kong*, 138 F.R.D. 27, 32 n.6 (S.D.N.Y.1991), so
12 concerns regarding any unfairness of granting the petition *ex parte* are alleviated by the fact that the
13 opposing party may raise objections and exercise its due process rights by challenging the discovery after
14 it is issued, *see In re Letters Rogatory from Tokyo Dist.*, 539 F.2d 1216, 1219 (9th Cir. 1976). In short,
15 “[a]n *ex parte* application is an acceptable method for seeking discovery pursuant to § 1782.” *In re*
16 *Roebers*, 2012 WL 2862122, *2 (N.D. Cal. July 11, 2012). Accordingly, the Court finds the pending
17 petition properly decided on an *ex parte* basis.

18 **III. ANALYSIS**

19 A court is authorized to issue an order pursuant to § 1782 once the enumerated statutory
20 requirements have been satisfied. *See, e.g., Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79,
21 83-84 (2d Cir. 2004). Even where those statutory requirements have been satisfied, however, the Court
22 is not required to grant the § 1782 petition. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241,
23 264 (2004). Instead, it analyzes several discretionary factors to determine whether the discovery sought
24 should be allowed. *See id.* at 264-65. The Court addresses the statutory requirements and discretionary
25 factors in turn below.

1 A. STATUTORY REQUIREMENTS

2 Section 1782 provides in relevant part that:

3 The district court of the district in which a person resides or is found may order him to
4 give his testimony or statement or to produce a document or other thing for use in a
5 proceeding in a foreign or international tribunal, including criminal investigations
6 conducted before formal accusation. The order may be made . . . upon the application of
7 any interested person and may direct that the testimony or statement be given, or the
8 document or other thing be produced, before a person appointed by the court.

9 28 U.S.C. § 1782(a). Pursuant to this statutory language, this Court is authorized to grant a § 1782
10 application where a *prima facie* showing is made that (1) the person from whom discovery is sought
11 resides or is found in this District, (2) the discovery is for use in a proceeding before a foreign or
12 international tribunal, and (3) the application is made by a foreign or international tribunal or any
13 interested person. *See In re Application of Ontario Principals' Council*, 2013 WL 6844545, *2 (E.D.
14 Cal. Dec. 23, 2013) (quoting *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998)). The Court finds that
15 each of these statutory requirements is met in this case.

16 First, Petitioner has presented evidence that Mr. Ma resides in this District, both in the form of
17 his assertions in relation to the litigation in the Netherlands and public records in Nevada. *See* Suppl.
18 Rumora-Scheltema Decl. ¶¶ 2-4, Exhs. 1-3 (Docket No. 6-2); Suppl. Mills Decl. ¶¶ 3-4, Exhs. 1-2
19 (Docket Nos. 6-1, 7). Second, the discovery is sought for use in pending and prospective actions in the
20 District Court of Amsterdam, the Netherlands. *See, e.g.*, Rumora-Scheltema Decl. ¶ 19. Third,
21 Petitioner is a party to the proceedings in the Netherlands, *see id.* at ¶¶ 8-14, and therefore qualifies as
22 an “interested person,” *see Intel*, 542 U.S. at 256. Accordingly, the Court finds the statutory
23 requirements to grant § 1782 relief are satisfied.

24 B. DISCRETIONARY FACTORS

25 Courts are not required to grant a § 1782 application simply because the statutory requirements
26 are met. *See Intel*, 542 U.S. at 264. The Court has broad discretion in deciding whether to grant
27 discovery under § 1782. *Four Pillars Enterps. Co. v. Avery Dennison Corp.*, 308 F.3d 1075, 1078 (9th
28 Cir. 2002). The Supreme Court outlined the discretionary factors that district courts should consider
when ruling on a § 1782 application:

(1) whether the material sought is within the foreign tribunal's jurisdictional reach and thus accessible absent Section 1782 aid; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court jurisdictional assistance; (3) whether the Section 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the subpoena contains unduly intrusive or burdensome requests.

Republic of Ecuador, 2010 WL 3702427, at *2. “[D]istrict courts must exercise their discretion under § 1782 in light of the twin aims of the statute: providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts . . .” *Schmitz*, 376 F.3d at 84 (quoting *In re Metallgesellschaft AG*, 121 F.3d 77, 79 (2d Cir. 1997)). The Court finds that the discretionary factors militate in favor of granting the petition in this case.

First, the Court analyzes whether the material sought is within the foreign tribunal's jurisdictional reach. Petitioner argues that even though Ma is a party to the litigation in the Netherlands, the applicable discovery rules are more limited than provided by the discovery rules applicable here. *See* Docket No. 6 at 4. Petitioner argues that it is unlikely the Dutch courts are able to order the discovery sought here. In support of that argument, Petitioner submitted the declaration of an experienced Dutch litigator explaining the limitations to discovery under the Dutch civil code system generally and difficulties in obtaining the discovery in the specific cases at issue there. *See* Rumora-Scheltema Suppl. Decl. ¶¶ 5-12. Where the foreign tribunal's procedural rules may not allow for the discovery sought, this factor militates in favor of granting § 1782 relief. *See In re Servicio Pan Americano de Proteccion, C.A.*, 354 F. Supp. 2d 269, 274 (S.D.N.Y. 2004).

Second, the Court analyzes the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign court. “[T]he Amsterdam District Court is, like this court, a court of first resort in the Netherlands. Further, it appears that the courts in the Netherlands have been historically receptive to requests for assistance by the United States.” *In re Qwest Comm's Int'l Inc.*, 2008 WL 2741111, *5 (W.D.N.C. July 10, 2008) (internal citation omitted); *see also In re Duizendstraal*, 1997 WL 195443, *2 (N.D. Tex. Apr. 16, 1997) (discussing Dutch case law exhibiting receptivity to U.S. judicial assistance). This factor also militates in favor of granting § 1782 relief.

1 Third, the Court analyzes whether the pending request is an attempt to circumvent foreign proof-
2 gathering restrictions. As noted above, the applicable discovery rules in the Netherlands are more
3 limited than those applicable in this Court. Nonetheless, Dutch courts have expressly ruled that parties
4 there may rely on § 1782 petitions in this country as a lawful means of obtaining discovery. *See*
5 *Duizendstraal*, 1997 WL 195443, *2 (quoting ruling in parallel Dutch proceeding in which the party
6 opposing a § 1782 petition sought an injunction by the Dutch courts). Where foreign countries have
7 adopted limited discovery rules but allow parties to use broader discovery obtained pursuant to § 1782,
8 this factor militates in favor of granting § 1782 relief. *See Servicio Pan Americano*, 354 F. Supp. 2d at
9 274-75.

10 Fourth, the Court analyzes whether the subpoenas contain unduly intrusive or burdensome
11 requests. The proper scope of discovery arising out of a § 1782 application is generally determined by
12 the Federal Rules of Civil Procedure. *See, e.g., Government of Ghana v. ProEnergy Servs., LLC*, 677
13 F.3d 340, 343 (8th Cir. 2012); *see also In re Letters Rogatory From Tokyo Dist. Prosecutor's Office*,
14 16 F.3d 1016, 1019 (9th Cir. 1994) (unless the court order otherwise specifies, the Federal Rules of Civil
15 Procedure apply). Petitioner argues that the central issue in the Dutch litigation is Mr. Ma's role in
16 transferring Juno's assets, burdening it with antecedent debt and otherwise thwarting its efforts to
17 enforce its judgment. Docket No. 6 at 6. At this stage, the Court is satisfied that Petitioner has made
18 a *prima facie* showing that the information sought has some relevance to the Dutch litigation.
19 Nonetheless, Mr. Ma is not precluded from challenging the subpoenas once issued as being unduly
20 burdensome, irrelevant or overly broad. *See, e.g., Republic of Ecuador*, 2010 WL 3702427, at *5.

21 III. CONCLUSION

22 For the reasons discussed more fully above, Petitioner's *ex parte* petition for an order pursuant
23 to 28 U.S.C. § 1782 is hereby **GRANTED**.

24 IT IS SO ORDERED.

25 DATED: June 4, 2014.

26
27 
28 NANCY J. KOPPE
United States Magistrate Judge